

**STATE OF INDIANA
DEPARTMENT OF STATE REVENUE**

IN REGARDS TO THE MATTER OF:

**FORT MIAMI DETACHMENT
MARINE CORPS LEAGUE, INC.
DOCKET NO. 29-2004-0095**

**FINDINGS OF FACT, CONCLUSIONS OF
LAW AND PROPOSED DEPARTMENTAL ORDER**

An administrative hearing was held on Thursday, April 22, 2004 in the office of the Indiana Department of State Revenue, 100 N. Senate Avenue, Room N248, Indianapolis, Indiana 46204 before Bruce R. Kolb, Administrative Law Judge acting on behalf of and under the authority of the Commissioner of the Indiana Department of State Revenue.

Petitioner, Fort Miami Detachment Marine Corps League, Inc., was represented by Arend J. Abel and Marilyn Moores of Cohen & Malad, LLP, One Indiana Square, Suite 1400, Indianapolis, Indiana 46204. John M. Miller appeared on behalf of the Indiana Department of State Revenue.

A hearing was conducted pursuant to IC 4-21.5 et seq., evidence was submitted, and testimony given. The Department maintains a record of the proceedings. Being duly advised and having considered the entire record, the Administrative Law Judge makes the following Findings of Fact, Conclusions of Law and Proposed Departmental Order.

REASON FOR HEARING

Petitioner was the subject of an audit which was completed on or about September 27, 2002. The audit and subsequent assessments covered the periods ending May 31, 1999 through May 31, 2002. On January 5, 2004, the Petitioner's charity gaming license was suspended for three (3) years, and Petitioner was assessed civil penalties in the amount of seven thousand one hundred dollars (\$7,100). The Petitioner protested in a timely manner.

FINDINGS OF FACTS

- 1) The Indiana Department of Revenue completed a charity game audit of Petitioner on or about September 27, 2002. (Department's Exhibit B).
- 2) The Department also conducted an income tax, sales, and use tax audit of the Petitioner. (Department's Exhibit B).
- 3) Petitioner did not protest the Department's assessments, and paid all of its liabilities in full no later than February 4, 2003. (Petitioner's Exhibit #1).

- 4) On March 2, 2002 the Department issued a letter outlining civil penalties and a suspension based upon the September 27, 2002 audit results. (Department's Exhibit A).
- 5) In its letter of March 2, 2002 the Department stated, "The investigation by the Department revealed that Fort Miami Marine Corps League failed to keep accurate records of the allowable events it conducted, and to make accurate and timely reports of all financial aspects of the allowable events as required by IC 4-32-9-17. The Department reconstructed that gaming records pertaining to the sale of pull tabs. The investigation determined that Fort Miami understated its gross receipts derived from the sale of pull tabs by \$105,309. This understatement of gross receipts derived from the sale of pull tabs resulted in the organization's charity gaming license fees being underreported by \$3,750 for the periods ended April 30, 1999 and April 30, 2000...**The Department imposes a civil penalty of five hundred dollars (\$500.00).**" (Department's Exhibit A).
- 6) Michael Broz, Commandant of Petitioner's organization stated in his affidavit, "After the audit was completed, I discovered in an outside building that used to be a concession stand, numerous boxes of unused gaming materials that were not reported on our organization's annual inventory filed with the Department of Revenue..."(Petitioner's Exhibit #1).
- 7) The Department's letter dated March 2, 2002 also stated, "The audit noted that on three occasions Fort Miami Marine Corps League sold pull tab games with a payout of more than \$20,000. One game was called 5365 Red Hot and had a payout of \$2,400. Another game was called CRW 105 Cruisin with a payout of \$2,982. The third game was called BTW 104 Spin Bottle with a payout of \$2,188. All games were purchased from Clarke Bingo. *Indiana Code § 4-32-9-33. Prize limits for pull tab, punchboard and tip board games. (a) The total prizes awarded from one (1) pull tab, punchboard and tip board game may not exceed two thousand dollars (\$2,000)*...**The Department imposes a civil penalty for the second violation of one-thousand six hundred dollars (\$1,600).** It is the Department's opinion that an organization should not profit from pull tab games exceeding the maximum dollar limit." (Department's Exhibit A).
- 8) As to whether Petitioner on three separate occasions sold pull tab games with payouts in excess of \$2,000, Petitioner's counsel stated, "We have not presented any evidence refuting that, that particular point. In fact, I pressed—we pressed for that. Our client describes to us, saying no contest, because we can't prove or disprove it." (Record at 59-60).
- 9) Finally, the Department's letter of March 2, 2003 stated, "During the audit, it was noted that Fort Miami Marine Corps League had 8 unauthorized "Cherry Master" gambling machines. An investigation by the Criminal Investigation Division in November of 2001 noted that

Fort Miami Marine Corps League possessed unauthorized gambling machines. The operation of gambling machines as defined in IC 35-45-5-1 constitutes illegal gambling. *Indiana Administrative Code, 45 IAC 18-1-18, defines "Conduct prejudicial to the public confidence in the department" to include operating a gambling device, including any activity illegal under IC 35-45-5-1...* In this case the organization has engaged in conduct prejudicial to the public confidence in the department and **the Department imposes a civil penalty of five thousand dollars (\$5,000).** *Indiana Code § 4-32-12-3. Additional penalties authorized. In addition to the penalties described in section 2 [IC 4-32-12-2] of this chapter, the department may do all or any of the following: (1) Suspend or revoke the license. (2) Lengthen a period of suspension of the license. (3) Prohibit an operator or an individual who has been found to be in violation of this article from associating with charity gaming conducted by a qualified organization. (4) Impose an additional civil penalty of not more than one hundred dollars (\$100) for each day the civil penalty goes unpaid.* Since the Fort Miami Marine Corps League has been found to be in possession of illegal gambling machines, "Cherry Masters", the Department hereby suspends the charity gaming license of the Fort Miami Detachment Marine Cops League, Inc for a period of three (3) years effective with the receipt of this letter. The Department noted on 2 different occasions, once by the Criminal Investigation Division November 2001 and again by the Audit Division in September 2002 that Fort Miami Marine Corps League possessed gambling machines that were in violation of Indiana Administrative Code 45 § 18-1-18 and Indiana Code § 35-45-5-1." (Department's Exhibit A).

10) During Petitioner's audit, eight (8) "Cherry Master" video machines were observed at Petitioner's location. (Department's Exhibit B).

11) On Cross-Examination of the Department's witness, the questioning was as follows:

Q. Did you see anyone at Fort Miami receive cash as a result of playing Cherry Masters at any time when you were there?

A. No.

MR. DRERUP¹: Your actual lottery work was in the other part of the building, wasn't it, Tom?

THE DEPONENT: Right.

MR. DRERUP: I mean quite a distance and through doorways. You didn't even come through that entrance normally, where the Cherry Masters are.

¹ Stephen Drerup an auditor, was not being questioned by Petitioner's attorney. Mr. Drerup was sworn in at the beginning of the hearing as were all of the potential witnesses. His spontaneous answers were unsolicited, but were made on the record and under oath. There were no objections to his spontaneous responses by either party.

THE DEPONENT: I came through that entrance a few days, but all I saw was people, one or two people. It wasn't a whole lot. But I saw no payout. (Record at 26).

- 12) Michael Broz, Commandant of Petitioner's organization stated in his affidavit, "We have removed all "Cherrymaster" amusement machines, which had been located in a private location requiring key card access on our premises, completely separated from the public area where bingo is conducted..."(Petitioner's Exhibit #1).
- 13) The collection reports obtained by the Department show the amount of money in the gaming machines, the merchant's share, and the amount due the operator (Department's Exhibits C, D, and E). These reports only show the amount of money in each machine when it is serviced by the vendor. This income is then split between the vendor and Petitioner. Therefore, the records only show the amount of money received by the Petitioner from each machine. The reports do not show whether there were any payouts to patrons.
- 14) On January 5, 2004, the Petitioner's charity gaming license was suspended for three (3) years, and Petitioner was assessed civil penalties in the amount of seven thousand one hundred dollars (\$7,100).

STATEMENT OF LAW

- 1) The periods at issue are the years ending May 31, 1999 through May 31, 2002. Pursuant to IC 4-32-8-1, IC 6-8.1 applies to the department's decision making process under this article, except that a formal protest of any decision, intended decision, or other action must be filed not more than seventy-two (72) hours after receipt of the notice of decision, intended decision, or other action. (*As added by P.L.24-1992, SEC.49*). The Department's hearings were governed by IC 6-8.1-5-1 during the years at issue. However, the Department also followed the hearing procedures found in IC 4-21.5 in order to conduct its hearings in an orderly manner. This allowed the court reporter to produce a thorough written transcript in case the matter was appealed. Charity gaming matters do not fall under the jurisdiction of the tax court. Charity gaming matters shall be appealed to a local Circuit or Superior whose review is not de novo.
- 2) The Department's hearings are now governed by IC 4-21.5 exclusively. (See IC 4-32-8-5. *As added by P.L.188-2003, SEC.3.*).
- 3) Pursuant to IC 6-8.1-5-1, the burden of proving that the Department's findings are incorrect rests with the individual or organization against which the department's findings are made. The department's investigation establishes a prima facie presumption of the validity of the department's findings. (Burden of proof now found in 45 IAC 18-8-4).

- 4) The Department's administrative hearings are conducted pursuant to IC 6-8.1- 5-1 and IC § 4-21.5 et seq. (See, House Enrolled Act No. 1556).
- 5) IC 4-21.5-3-25(b) provides in pertinent part, "The administrative law judge shall regulate the course of the proceedings in conformity with any prehearing order and in an informal manner without recourse to the technical, common law rules of evidence applicable to civil actions in the courts..."
- 6) IC 4-21.5-2-26(a) states, "The administrative law judge may admit hearsay evidence. If not objected to, the hearsay evidence may form the basis for an order. However, if the evidence is properly objected to and does not fall within a recognized exemption to the hearsay rule, the resulting order may not be based solely upon the hearsay evidence."
- 7) "It is reasonable...to adopt a preponderance of the evidence standard..." Burke v. City of Anderson, 612 N.E.2d 559, 565 (Ind.App. 1993).
- 8) 45 IAC 18-1-18 states, "'Conduct prejudicial to the public confidence in the department,' as used in this article and in IC 4-32-1 means conduct that gives the appearance of impropriety, including the failure to file tax returns, conducting a gaming event without a license, sports betting, operating a gambling device, using or possessing a computer or other technologic aid, as defined in section 16 of this rule, or any other activity illegal under IC 35-45-5-1 et seq." (*Department of State Revenue; 45 IAC 18-1-18; filed Feb 28, 2003, 2:16 p.m.: 26 IR 2302*).
- 9) IC 4-32-9-17 states, "A qualified organization shall maintain accurate records of all financial aspects of an allowable event under this article. A qualified organization shall make accurate reports of all financial aspects of an allowable event to the department within the time established by the department. The department may prescribe forms for this purpose. The department shall, by rule, require a qualified organization to deposit funds received from an allowable event in a separate and segregated account set up for that purpose. All expenses of the qualified organization with respect to an allowable event shall be paid from the separate account."
- 10) IC 35-45-5-1 states, "... "Gambling device" means:
 - (1) a mechanism by the operation of which a right to money or other property may be credited, in return for consideration, as the result of the operation of an element of chance;
 - (2) a mechanism that, when operated for a consideration, does not return the same value or property for the same consideration upon each operation;
 - (3) a mechanism, furniture, fixture, construction, or installation designed primarily for use in connection with

professional gambling;

(4) a policy ticket or wheel; or

(5) a subassembly or essential part designed or intended for use in connection with such a device, mechanism, furniture, fixture, construction, or installation.

In the application of this definition, an immediate and unrecorded right to replay mechanically conferred on players of pinball machines and similar amusement devices is presumed to be without value...”

- 11) IC 35-45-5-3 provides that, “A person who knowingly or intentionally:
 - (1) engages in pool-selling;
 - (2) engages in bookmaking;
 - (3) maintains, in a place accessible to the public, slot machines, one-ball machines or variants thereof, pinball machines that award anything other than an immediate and unrecorded right of replay, roulette wheels, dice tables, or money or merchandise pushcards, punchboards, jars, or spindles;
 - (4) conducts lotteries, gift enterprises, or policy or numbers games, or sells chances therein;
 - (5) conducts any banking or percentage games played with cards, dice, or counters, or accepts any fixed share of the stakes therein; or
 - (6) accepts, or offers to accept, for profit, money or other property risked in gambling; commits professional gambling, a Class D felony.”
- 12) “‘Gambling device’ is defined as ‘a mechanism by the operation of which a right to money or other property may be credited, in return for consideration, as the result of the operation of an element of chance,’ as well as ‘a mechanism that, when operated for a consideration, does not return the same value or property for the same consideration upon each operation.’” 2001 Op. Att’y Gen 9 (2002).
- 13) The court in Maillard held that because the quarter slide machine did not always return the same value or property for the same consideration upon each operation, the machine was “a mechanism by the operation of which a right to money or other property may be credited, in return for consideration, as the result of the operation of an element of chance,” therefore, it was found to be a gambling device prohibited by statute. State v. Maillard, 695 N.E.2d 637, 641 (Ind. Ct. App. 1998), transfer denied by Cain v. Maillard, 706 N.E.2d 173 (Ind. 1998).
- 14) IC 4-32-9-33 provides in part, “(a) The total prizes awarded for one (1) pull tab, punchboard, or tip board game may not exceed two thousand dollars (\$2,000).
 - (b) A single prize awarded for one (1) winning ticket in a pull

tab, punchboard, or tip board game may not exceed three hundred dollars (\$300).

(c) The selling price for one (1) ticket for a pull tab, punchboard, or tip board game may not exceed one dollar (\$1).

- 15) IC 4-32-12-1(a) provides in pertinent part, "The Department may suspend or revoke the license or levy a civil penalty against a qualified organization or an individual under this article for any of the following: (1) Violation of a provision of this article or of a rule of the department...(5) Conduct prejudicial to public confidence in the department."
- 16) IC 4-32-12-2 states, "The department may impose upon a qualified organization or an individual the following civil penalties:
 - (1) Not more than one thousand dollars (\$1,000) for the first violation.
 - (2) Not more than two thousand five hundred dollars (\$2,500) for the second violation.
 - (3) Not more than five thousand dollars (\$5,000) for each additional violation."
- 17) IC 4-32-12-3 states, In addition to the penalties described in section 2 of this chapter, the department may do all or any of the following:
 - (1) Suspend or revoke the license.
 - (2) Lengthen a period of suspension of the license.
 - (3) Prohibit an operator or an individual who has been found to be in violation of this article from associating with charity gaming conducted by a qualified organization.
 - (4) Impose an additional civil penalty of not more than one hundred dollars (\$100) for each day the civil penalty goes unpaid.

CONCLUSIONS OF LAW

- 1) The Department's audit investigation revealed that Petitioner had failed to keep accurate records of the allowable events it conducted. This is evidenced by the numerous boxes of gaming materials Petitioner states were subsequently found.
- 2) Petitioner inability to accurately account for all its bingo and charity gaming supplies show a failure to make accurate and timely reports of all financial aspects of the allowable events. This is a violation of IC 4-32-9-17.
- 3) Petitioner's counsel acquiesced to the Department's assertion that on three separate occasions sold pull tab games with payouts in excess of \$2,000 a violation of IC 4-32-9-33.
- 4) Petitioner possessed eight (8) "Cherry Master" video machines.

- 5) The Department cited 45 IAC 18-1-18 and levied a civil penalty of five thousand dollars (\$5,000) for violating this provision of the Indiana Code. However, 45 IAC 18-1-18 was not in effect at the time the alleged violation occurred.
- 6) Pursuant to IC 6-8.1-5-1, the burden of proving that the Department's findings are incorrect rests with the individual or organization against which the department's findings are made. The Department's investigation establishes a prima facie presumption of the validity of the Department's findings. However, the Department at a minimum must have a reasonable basis for its findings.
- 7) Depending upon how the machines in question are used, they could be used for amusement purposes. The machines can also be used as an illegal gambling device. Evidence of possible illegal use could include a reset button which is used to clear the machine after each player has finished, or a machine that produces a paper ticket showing the number of credits earned and is therefore used to receive payment.
- 8) There was no evidence offered by the Department showing in fact that the Cherry Master machines were used in an illegal manner, or that they in fact meet the definition of a gambling device as defined in IC 35-45-5-1.
- 9) Pursuant to IC 4-32-12-3 the Department has the statutory authority to lengthen a period of suspension of the license to conduct charity gaming.
- 10) Petitioner's allegation that the Department's actions were in retaliation for the organization filing a lawsuit in another matter was not supported by any evidence, and can only be viewed as mere speculation.

PROPOSED DEPARTMENTAL ORDER

Following due consideration of the entire record, the Administrative Law Judge orders the following:

The Petitioner's appeal is denied in part and sustained in part. The Department's audit investigation revealed that Petitioner had failed to keep accurate records of the allowable events it conducted. This is evidenced by the numerous boxes of gaming supplies Petitioner's representative states were subsequently found. Petitioner's inability to accurately account for all its bingo and charity gaming supplies shows a failure to make accurate and timely reports of all financial aspects of the allowable events. This is a violation of IC 4-32-9-17. Petitioner's counsel acquiesced to the Department's assertion that on three separate occasions it sold pull tab games with payouts in excess of \$2,000 a violation of IC 4-32-9-33. Petitioner could not have violated the provisions of 45 IAC 18-1-18 because the regulation did not exist at the time of the alleged violation. The Department failed to establish a reasonable basis for its assertion that the video gaming machines in question were used for illegal purposes or constituted gambling devices as defined in IC 35-45-5-1.

The years that were subject to audit by the Department are closed. The Petitioner's failure to pursue its right to protest negates the Department's ability to review the numerous boxes of records recently found by Petitioner. However, since the assessments were paid in full, by statute, the Petitioner may file a claim for refund which would allow the Department to review these records. Any subsequent review of these records will have no bearing upon the findings of this hearing.

- 1) Administrative review of this proposed decision may be obtained by filing, with the Commissioner of the Indiana Department of State Revenue, a written document identifying the basis for each objection within fifteen (15) days after service of this proposed decision. IC 4-21.5-3-29(d).
- 2) Judicial review of a final order may be sought under IC 4-21.5-5.

THIS PROPOSED DEPARTMENTAL ORDER SHALL BECOME THE FINAL ORDER OF THE INDIANA DEPARTMENT OF STATE REVENUE UNLESS OBJECTIONS ARE FILED WITHIN FIFTEEN (15) DAYS FROM THE DATE THE ORDER IS SERVED ON THE PETITIONER.

Dated: _____

Bruce R. Kolb / Administrative Law Judge